



## LEGAL OPINION

RE: CJEU CASE C-176/18

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### I. ABOUT CIOPORA

CIOPORA is the International Association of Breeders of Asexually Reproduced Ornamental and Fruit Varieties. Since 1961, CIOPORA has been representing such breeders, who account for two-thirds of all Plant Variety Rights (PVR) titles in the world, in all matters of Intellectual Property (IP) Protection before governments and international organizations. CIOPORA's main priority is the constant development and enhancement of systems of IP Protection for asexually reproduced ornamental and fruit plant varieties. CIOPORA is a member-based, non-profit organization and currently represents over 100 member companies from 25 countries.

### II. INTRODUCTORY COMMENT

1. CIOPORA recently learned about a reference for a preliminary ruling to the Court of Justice of the EU ("**CJEU**") that was made by the Spanish supreme court ("**Tribunal Supremo**") on the interpretation of EU Regulation 2100/94 on the Community Plant Variety Right (the "**Regulation**") and, more particularly, of Articles 13 and 95 of that Regulation. Because this matter is of high importance to the CIOPORA membership, yet the formulation of the questions referred by the Spanish court is not entirely clear to CIOPORA and thus risks resulting in an uncertain outcome, CIOPORA deems it is appropriate to issue the present Legal Opinion.

### III. FACTUAL BACKGROUND

2. In summary, CIOPORA understands the relevant facts underlying the case before the Spanish supreme court to be as follows:

- An application for a plant variety right for the seedless Nadorcott mandarin variety was filed at the Community Plant Variety Rights Office (“**CPVO**”) on 22 August 1995. The application was published in the CPVO’s “Official Gazette” on **22 February 1996**. From this day onwards and until the day it was granted, the application benefited from **provisional protection** pursuant to Article 95 of the Regulation.
- The application was subsequently granted on 4 October 2004 under number 14111, but as a result of an appeal against the grant decision, the grant only took effect as of **8 November 2005** (with publication on 15 February 2006).
- The right was granted to the French company Nadorcott Protection, who provided an exclusive licence to a Spanish company Carpa Dorada, who in turn gave an enforcement mandate to Club de Variedades Vegetales Protegidas (“**CVVP**”). This entity was thus entitled to enforce the plant variety right pursuant to Article 104 of the Regulation.
- Young trees of the Nadorcott variety were propagated in a Spanish nursery after the publication of the application (i.e. after 22 February 1996) without the consent of the right holder.
- The trees were subsequently purchased by a Spanish grower, Mr Martínez Sanchis, who planted part of them on his field in spring 2005 (i.e. still before the definitive grant of the plant variety right), and another part in spring 2006 (i.e. after the definitive grant of the plant variety right).

#### IV. QUESTIONS REFERRED TO THE CJEU

3. Against the backdrop of these factual elements, the Spanish supreme court has now referred the following questions to the CJEU (official English translation taken from the *Curia* website<sup>1</sup>):

- a. When a farmer has purchased some plants belonging to a plant variety from a nursery (establishment owned by a third party) and planted them before the grant of the variety right has come into effect, in order for the subsequent activity of that farmer of collecting the successive harvests to be covered by the *ius prohibendi* in Article 13(2) of Regulation (EC) No 2100/94,<sup>1</sup> must the requirements under Article 13(3) be satisfied for Article 13(2) to be interpreted as relating to harvested material? Or must Article 13(2) be interpreted as meaning that the activity of harvesting is an act of production or reproduction of the variety which results in ‘harvested material’, whose prohibition by the holder of the plant variety does not require the conditions in Article 13(3) to be satisfied?
- b. Is an interpretation to the effect that the cumulative protection scheme covers all of the acts listed in Article 13(2) that refer to ‘harvested material’ and also the harvest itself, or that it covers only acts subsequent to the collection of that harvested material, whether the storage or marketing of that material, compatible with Article 13(3) of Regulation (EC) No 2100/94?

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<http://curia.europa.eu/juris/document/document.jsf?text=Cuestiones%2Bprejudiciales%2Bvegetales%2B&docid=203076&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=491994#ctx1>

- c. In applying the scheme for extending the cumulative protection to ‘harvested material’, provided for in Article 13(3) of Regulation (EC) No 2100/94, in order for the first condition to be satisfied, is it necessary for the purchase of the plants to have taken place after the holder obtained Community protection for the plant variety, or [Or.10] is it sufficient that at that time the plant variety enjoyed provisional protection, as the purchase took place in the period between publication of the application and the grant of the plant variety right coming into effect?

4. In the understanding of CIOPORA the Spanish supreme court is essentially asking whether **(i)** a grower who has purchased and planted trees that have been propagated without the consent of the right holder of the Nadorcott variety by a third party nursery, violates Articles 13(2) and/or 13(3) of the Regulation and **(ii)** for the assessment of the existence of that alleged violation, it is relevant that the unauthorized propagation and part of the planting took place *before* grant of the plant variety right, but *after* the publication of its application.

5. CIOPORA submits that the answer to question **(i)** is **affirmative** because the trees were subject to unauthorized propagation and those illegally propagated trees were then placed on the market for the first time without the consent of the right holder, thus “contaminating” every further activity by any further third party in relation to both the illegally propagated trees and the fruits harvested from them.

CIOPORA submits that the answer to question **(ii)**, on the other hand, is **negative** because the exclusive rights of the right holder in relation to both the trees and their harvest apply from the date of publication of the application. Distinguishing which activities took place before and after the grant of the plant variety right is therefore legally irrelevant for determining the *existence* of the infringement. It is only relevant for determining the *sanctions* for the infringement since the sanction for activities carried out prior to grant are lower than those for activities carried out after the grant of the plant variety right.

6. CIOPORA will further explain these submissions in the following paragraphs. Question (i) will be addressed in chapters **V.A.** to **V.D.** below, whereas question (ii) will be addressed in chapter **V.E.**

## **V. THE SPANISH GROWER INFRINGES THE EU PLANT VARIETY RIGHT FOR NADORCOTT**

### **A. THE LEGAL QUALIFICATION OF TREES AND FRUIT UNDER THE REGULATION**

7. Under the Regulation, a right holder<sup>2</sup> can exercise his plant variety right at two<sup>3</sup> levels: the level of “variety constituents” (Article 13(2) of the Regulation) and the level of “harvested material” (Articles 13(2) and 13(3) of the Regulation). Each level has a specific set of exclusive rights attributed to it. Before looking into what those rights are, it is important to determine in what category trees and their fruits fall.

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<sup>2</sup> A “rightholder” can be both the actual holder of the plant variety right (in this case Nadorcott Protection), or a licensee such as Carpa Dorada (Article 104 of the Regulation).

<sup>3</sup> The European legislator has the right to even extend the exclusive rights of the rightholder to a third level, i.e. to “products obtained directly from material of the protected variety” (Article 13(4) of the Regulation), but has thus far not exercised that right.

8. Article 5(3) of the Regulation defines “**variety constituents**” as “*a plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants*”.

It follows from this definition that (young) mandarin trees are “variety constituents” because they are “entire plants”.

9. The Regulation itself does not define the term “**harvested material**”. In some literature, the term “harvested material” is said to refer “*to all products of the harvest; dependent on the variety in question, it includes fruit, vegetables, mushrooms, flowers, cereals, fodder, and fibres*”.<sup>4</sup> It is furthermore the position of CIOPORA that any plant material that is capable of producing entire plants true-to-type is a variety constituent according to the Regulation, irrespective of whether the material (in a technical sense) has been or can be harvested. Only plant material which is not capable, by any means, of producing another plant with the same characteristics should be considered “harvested material” within the meaning of the Regulation.<sup>5</sup>

It follows that seedless mandarins harvested from a mandarin tree are “harvested material”.

## **B. THE RIGHT HOLDER’S EXCLUSIVE RIGHTS IN RELATION TO MANDARIN TREES (“VARIETY CONSTITUENTS”)**

10. Like all intellectual property rights, a plant variety right is a negative right, i.e. the right to prevent third parties from carrying out certain activities that the legislator has exclusively reserved for the right holder.

11. In the Regulation, the exclusive rights that a right holder can thus enforce against any third party who did not obtain its authorization/consent for a given reserved activity, are limitatively outlined in Article 13(2), as follows:

“2. Without prejudice to the provisions of Articles 15 and 16, the following acts in respect of variety constituents [...] shall require the authorization of the holder:

- (a) **production or reproduction (multiplication);**
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) **selling or other marketing;**
- (e) exporting from the Community;
- (f) importing to the Community;
- (g) stocking for any of the purposes mentioned in (a) to (f).

The holder may make his authorization subject to conditions and limitations” (CIOPORA’s own emphasis).

Whereas the “acts” in subsections (a) and (b) of Article 13(2) relate to the production and propagation of the variety, those in subsections (c) to (g) relate to its commercialization.

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<sup>4</sup> G. WÜRTEMBERGER et al., *EU Plant Variety Protection*, Oxford, OUP, 2015, § 6.13.

<sup>5</sup> CIOPORA, ‘Scope of the Right’ in CIOPORA, *CIOPORA Position Papers on PBR and on Patents*, Hamburg, 2017, p. 8. <https://bit.ly/2JRkshp>, (accessed 24 July 2018).

In the present case, it appears that particularly subsections (a) and (d) are relevant.

**12.** First and foremost, the right holder's exclusive right of "production or reproduction (multiplication)" in **subsection (a)** means that no third party can produce, reproduce or "propagate" variety constituents of a variety without the right holder's consent. As is the case for other intellectual property rights, this right is the right holder's most important one, as it is never exhausted<sup>6</sup> (on "exhaustion" see further below).

It follows that, when a Spanish nursery propagates (e.g. by means of grafting or otherwise) variety constituents (trees) of the Nadorcott variety without the right holder's consent, the nursery violates Article 13(2)(a) of the Regulation and thus infringes the EU plant variety right for Nadorcott.

**13.** Moreover, by selling (or, more generally, commercializing) these illegally propagated trees to growers, the nursery has equally violated (at least) **subsection (d)** of Article 13(2) of the Regulation.

Like all reserved acts of commercialization in subsections (c) to (g) of Article 13(2), this right holder's exclusive right to control the first placing on the market of a variety constituent of a protected variety was held by the CJEU to be part of the "specific subject-matter" of a plant variety right.<sup>7</sup> Once this right has been exercised, the plant variety right will be exhausted (again: on "exhaustion", see further below), but only in relation to those specific variety constituents that have thus been put on the market by the right holder or with its consent.<sup>8</sup>

However, if variety constituents have, like in the present case, been put on the market for the first time by a third party without the right holder's consent and regardless of whether they have been illegally propagated (because the right under Article 13(2)(d) of the Regulation exists independently from that under Article 13(2)(a)), then clearly none of the acts of commercialization in subsections (c) to (g) of Article 13(2) of the Regulation have been exhausted.

**14.** As will be further explained in the section of "exhaustion" below, it can be concluded in light of the foregoing that the trees of the Nadorcott variety that have been purchased and planted by Mr Martínez Sanchis in this case, amount to an infringement of the right holder's EU plant variety right for that variety because the nursery from which he purchased the trees has illegally propagated them, *regardless* of whether Mr Martínez Sanchis himself has carried out any infringing activities in relation to those trees.

#### **C. THE RIGHT HOLDER'S EXCLUSIVE RIGHTS IN RELATION TO THE MANDARINS HARVESTED FROM THE TREES ("HARVESTED MATERIAL")**

**15.** In terms of exclusive rights, CIOPORA can be brief because the exclusive rights to act against harvested material are *as such* identical to those for variety constituents. This

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<sup>6</sup> G. WÜRTEMBERGER et al., *EU Plant Variety Protection*, Oxford, OUP, 2015, § 6.05.

<sup>7</sup> CJEU 31 October 1974, *Centrafarm* (16/74). Although, strictly speaking, this decision related to patents, a plant variety right is the intellectual property right closest related to a patent, so that the rationale of *Centrafarm* is equally applicable to plant variety rights. This is confirmed by the fact that the CJEU later held in *Nungesser* (CJEU 8 June 1982, 258/78) that plant variety rights are not to be treated any differently from other intellectual property rights.

<sup>8</sup> CJEU 1 July 1999, *Sebago* (C-173/98).

follows expressly from Article 13(2) of the Regulation, which, as already mentioned above (but this time including the relevant parts on harvested material), states that:

“2. Without prejudice to the provisions of Articles 15 and 16, the following acts in respect of variety constituents, or harvested material of the protected variety, both referred to hereinafter as ‘material’, shall require the authorization of the holder:

- (a) **production** or reproduction (multiplication);
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting from the Community;
- (f) importing to the Community;
- (g) stocking for any of the purposes mentioned in (a) to (f).

The holder may make his authorisation subject to conditions and limitations” (CIOPORA’s own emphasis).

**16.** Unless there is “exhaustion” (again: see below), i.e. unless the variety constituents or the harvested material have been disposed of to others by the right holder or with his consent within the meaning of Article 16 of the Regulation, each of these reserved acts in relation to harvested material require the authorization/consent of the right holder.

Since, in the present case, the variety constituents were neither propagated or disposed of to third parties by the right holder or with its consent, CIOPORA submits that it follows directly from the CJEU’s *Kanzi* apple decision<sup>9</sup> of 2011 (see below for further details on this case) that Mr Martínez Sanchis needed the consent of the right holder to produce mandarins of the Nadorcott variety in order for those mandarins not to amount to an infringement of the EU plant variety right for Nadorcott. As said, that conclusion would only have been different if the mandarins would have been harvested from trees that had been lawfully propagated and placed on the market for the first time (i.e. the in case of exhaustion of rights). No other alternative can be deemed valid, especially the invocation of purely national rules at odds with the sole exception already mentioned.

**17.** That being said, despite the exclusive rights of the right holder for harvested material *as such* being identical to those for variety constituents, the Regulation makes the exercise of the holder’s right against such harvested material dependent on the fulfillment of two conditions. These conditions are set out in Article 13(3) of the Regulation, which states the following:

“3. The provisions of paragraph 2 shall apply in respect of harvested material only if this was obtained through the unauthorised use of variety constituents of the protected variety, and unless the holder has had reasonable opportunity to exercise his right in relation to the said variety constituents”

In the present case, CIOPORA submits that, pursuant to the abovementioned CJEU *Kanzi* decision (§ 44), there is *no need to examine* whether the specific conditions of Article 13(3)

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<sup>9</sup> CJEU, 20 October 2011, Greenstar-Kanzi Europe (C-140/10), with case comments on this very issue published (in Dutch) by P. van der KOOIJ, “Uitputting in het kwekersrecht” (in English: “Exhaustion in plant variety rights law”), *Berichten Industriële Eigendom* 2011, 404; and P. de JONG, “Uitputting in het kwekersrecht” (in English: “Exhaustion in plant variety rights law”), *Intellectuele Rechten / Droits Intellectuels* 2012, 95.

of the Regulation are met, because the mandarins are harvested material of variety constituents that have been illegally propagated and placed on the market without the consent of the right holder. In other words, in line with the principle of *accessorium sequitur principale*, the infringing nature of the harvested material automatically follows the infringing nature of the variety constituents.

However, if the conditions of Article 13(3) of the Regulation are to be examined, it is clear that both criteria under that provision are met in the present case.

**18.** First of all, the mandarins were “obtained through the unauthorized use of variety constituents” of the Nadorcott variety because, as explained above, those variety constituents were illegally propagated by the Spanish nursery and placed on the market without the consent of the right holder. The Regulation does not require that the unauthorized use took place in the hands of the person producing the harvested material (i.e. that that person was *using* the variety constituents in an unauthorized manner).

**19.** Secondly, the right holder in the present case did not have “reasonable opportunity to exercise his right in relation to the ... variety constituents” for the simple reasons that (i) the right holder was not aware of the illegal propagation and that (ii), as outlined above, at the time of the illegal propagation of the Nadorcott trees by the Spanish nursery, the right holder was only the holder of an *application* for EU plant variety right protection. As will be further explained below, it follows from Article 95 of the Regulation that in that case there is only a provisional protection allowing the right holder to claim a “reasonable compensation” from an alleged infringer, but *not to stop* the infringing activity. That is something he can only do under Article 94 of the Regulation once the right is granted. It follows that the right holder in the present case could not have exercised its rights further upstream against the nursery in order to *prevent* the illegally propagated trees from falling in the hands of Mr Martínez Sanchis.

**20.** Finally, CIOPOA notes that the referring Spanish court, in its questions to the CJEU, refers to the act of “collecting” harvested material. Although it is not clear to CIOPOA why the Spanish court mentions precisely this activity, it wishes to highlight that both the acts *preceding* such collection (i.e. the production of the harvested material) and *following* that collection (i.e. the offering for sale, selling, other marketing, stocking, ...) are listed in Article 13(2).

In other words, the grower in the present case could not escape infringement by claiming that he is merely performing the act of “collecting” harvested material from Nadorcott trees, where, to come to that collection, he necessarily first produced the harvested material (infringement under Article 13(2)(a) read in conjunction with Article 13(3)) and subsequently performed one of the acts of commercialization in subsections (c) to (g) of Article 13(2) (read in conjunction with Article 13(3)) in relation to that harvested material.

#### **D. NO EXHAUSTION**

**21.** As already announced above, CIOPOA finds it important to make a few comments on the notion of “exhaustion” in the context of this case. Despite the fact that this notion is not part of the questions of case C-176/18 referred to the CJEU by the Spanish supreme court, CIOPOA submits that, even more than the questions that *were* referred, it is of crucial importance for the outcome of this case.

The main reason for this is that the grower in this case, although apparently not *expressly* doing so, is at least *implicitly* relying on the principle of exhaustion to escape a finding of infringement. However, exhaustion can never be a successful defense in this case.

**22.** In the Regulation, the principle of exhaustion (which is a principle that was initially developed in the case law of the CJEU<sup>10</sup>) is enshrined in Article 16, which reads as follows:

“The Community plant variety right shall not extend to acts concerning **any material of the protected variety**, or of a variety covered by the provisions of Article 13(5), which has been **disposed of to others by the holder or with his consent, in any part of the Community, or any material derived from the said material, unless** such acts:

- (a) involve **further propagation** of the variety in question, except where such propagation was intended when the material was disposed of; or
- (b) involve an export of variety constituents into a third country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes” (CIOFORA’s own emphasis).

**23.** It follows from this provision that there will *only* be exhaustion (i.e. that, in the present case, CVVP will no longer be able to prevent the further commercialization of the Nadorcott trees, nor of the fruit derived from those trees) if (i) those trees were placed on the market (“disposed of”) by the right holder or with its consent and (ii) if there is no further propagation of those trees.

Since in the present case, as explained earlier, the Nadorcott trees were *both* propagated *and* “disposed of” to others (i.e. to Mr Martínez Sanchis) by the Spanish nursery without the consent of the right holder, this case is a textbook example of a situation where there can never be a finding of exhaustion.

**24.** The mere fact that Mr Martínez Sanchis himself did not perform these initial unauthorized activities (i.e. the illegal propagation and/or the first placing on the market of the trees) does not take away the infringing nature of his own activities, as he seems to allege. As already mentioned above, this follows from the mere fact that, **as soon as variety constituents (i.e. the trees) have been placed on the market without the consent of the right holder (and, even more so, when they were illegally propagated), every subsequent activity performed by any subsequent third party in relation to those variety constituents and the harvested material resulting from it is “contaminated”**.

**25.** This has already been confirmed by the CJEU in the abovementioned *Kanzi* decision. In that case, both a tree grower (like Mr Martínez Sanchis) and a seller of fruit harvested from those trees were sued for plant variety rights infringement because they, respectively, grew trees and sold fruit from a variety the variety constituents of which had been placed on the EU market without the consent of the right holder. In that case, the lack of consent resulted from the right holder’s licensee having sold variety constituents (i.e. apple trees) of the protected variety to the aforementioned tree grower without having the latter sign a growing or commercialization agreement, which was one of the obligations imposed on the licensee in the licence agreement. The CJEU held that the tree grower’s defence, which hinged on the

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<sup>10</sup> For an overview in the context of plant variety rights law, see G. WÜRTEMBERGER et al., *EU Plant Variety Protection*, Oxford, OUP, 2015, § 6.96 *et seq.*



fact that there was exhaustion because the trees had been placed on the market by the right holder's licensee and therefore with the consent of the right holder, necessarily failed because the licensee had violated the terms of his licence agreement, so that the right holder could never be considered to have consented to the licensee's placing on the market of the trees. There was therefore no exhaustion and both the trees grown by the tree grower and the fruit sold by the fruit seller were held to infringe the plant variety right in question, precisely because they had been put on the market in violation of the right holder's exclusive right to control the first sale of his variety on the market on conditions that he determines at his own discretion.<sup>11</sup> Finally, the CJEU held that it was irrelevant for this finding of infringement that neither the tree grower, or the fruit seller were aware of the content of the licence agreement (and thus of the licensee's violation thereof). In other words: the court found that good faith is no excuse for infringement.

**26.** Applying the reasoning of this decision to the present case, this necessarily means that Mr Martínez Sanchis, even if he would have purchased the Nadorcott trees in complete ignorance of the fact that the person he was buying them from (the Spanish nursery) had illegally propagated them and had no consent to place them on the market, clearly infringes the EU plant variety right for Nadorcott. Compared to the *Kanzi* case, this finding in the present case is even exacerbated by the fact that, contrary to the *Kanzi* case where a licensee *had* the consent of the right holder but then violated the terms and conditions of that consent, the Spanish nursery had *no* consent (i.e. licence) whatsoever, so that the principles of the *Kanzi* case apply *a fortiori* to the present case.

## E. THE SCOPE OF THE PROVISIONAL PROTECTION OF EU PLANT VARIETY RIGHTS

**27.** It follows from the foregoing that both the Nadorcott trees planted and grown by Mr Martínez Sanchis and the fruits from those trees that Mr Martínez Sanchis produces and commercializes *per se* amount to an infringement of the **granted** EU plant variety right for Nadorcott, regardless of the precise activities carried out by Mr Martínez Sanchis in relation to that material.

The question remains, however, whether the unauthorized propagation and part of the planting that took place **before the grant** of the plant variety right, but *after* the publication of its application, equally amount to an infringement.

The answer to that question is affirmative pursuant to Article 95 of the Regulation.

**28.** According to that Article 95, which is entitled "Acts prior to grant of Community plant variety rights", the right holder "*may require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he would be prohibited from performing subsequent thereto*".

Since it was explained above that (i) the trees amount to an infringement because the Spanish nursery illegally propagated them and subsequently placed them on the market without the right holder's consent, (ii) both this propagation and this placing on the market took place after the publication of the application for the Nadorcott plant variety right, and (iii) Mr Martínez Sanchis (i.e. "any person", within the meaning of Article 95) grew these trees on

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<sup>11</sup> See in that regard, Article 13(2) *in fine* of the Regulation, which states that "the holder may make his authorization subject to conditions and limitations".

his farm and produced mandarins from it which he then commercialized (i.e. “*effected an act that he would be prohibited from performing subsequent [to grant]*”), it is clear that the conditions of Article 95 of the Regulation are met in the present case.

**29.** It follows that, as already announced above, the exclusive rights of the right holder in relation to both the trees and their harvest apply from the date of publication of the application. Distinguishing which activities took place before and after the grant of the plant variety right is therefore legally irrelevant for determining the *existence* of the infringement.

It is only relevant for determining the *sanctions* for the infringement since the sanction for activities carried out prior to grant are lower than those for activities carried out after the grant of the plant variety right: as explained earlier, pursuant to his provisional protection under Article 95 of the Regulation, the right holder can “only” claim reasonable compensation, whereas his full protection under Article 94 of the Regulation allows him to claim both reasonable compensation and injunctive relief (Article 94(1)) and “any further damage” in case of bad faith or negligence (Article 94(2)).

## **VI. PROPOSED ANSWERS TO THE (LITERAL) QUESTIONS OF THE COURT**

**30.** In paragraph 4 of this Opinion, CIOPORA suggested that it may be advisable to address the questions referred to the CJEU by the Spanish supreme court in a reformulated fashion.

In paragraph 5 of this Opinion, we also suggested what, in our opinion, the answers to those questions should be.

However, when taken literally and to the extent possible, CIOPORA submits that the answers from the Spanish court should be answered as follows:

### **A. QUESTION 1**

**31.** Question 1, in its original (English translated) version, was formulated as follows:

“When a farmer has purchased some plants belonging to a plant variety from a nursery (establishment owned by a third party) and planted them before the grant of the variety right has come into effect, in order for the subsequent activity of that farmer of collecting the successive harvests to be covered by the *ius prohibendi* in Article 13(2) of Regulation (EC) No 2100/94, must the requirements under Article 13(3) be satisfied for Article 13(2) to be interpreted as relating to harvested material? Or must Article 13(2) be interpreted as meaning that the activity of harvesting is an act of production or reproduction of the variety which results in ‘harvested material’, whose prohibition by the holder of the plant variety does not require the conditions in Article 13(3) to be satisfied?”

#### Proposed answer:

“Article 13(2) of Regulation (EC) No 2100/94 must be interpreted in the sense that a farmer who has purchases and plants variety constituents that were propagated and placed on the market without the consent of the right holder and who produces and

commercializes fruit from those variety constituents, violates the plant variety right for that variety, regardless of whether the said propagation and placing on the market took place after the grant of the plant variety right or between the publication of the application of the plant variety right and its grant.

Article 13(3) of Regulation (EC) No 2100/94 must be interpreted in the sense that a farmer who produces, within the meaning of Article 13(2)(a) of that Regulation, harvested material of a protected variety the constituents of which have, between the publication of the application of the plant variety right and its grant, been propagated and subsequently placed on the market without the consent of the right holder, obtains that harvested material through the unauthorized use of variety constituents of the protected variety, within the meaning of that provision. In view of the limited provisional protection provided under Article 95 of Regulation (EC) No 2100/94, the right holder has no reasonable opportunity to exercise his right in relation to the said variety constituents in the period between the publication of the application of the plant variety right and its grant”.

## B. QUESTION 2

32. Question 2, in its original (English translated) version, was formulated as follows:

“Is an interpretation to the effect that the cumulative protection scheme covers all of the acts listed in Article 13(2) that refer to ‘harvested material’ and also the harvest itself, or that it covers only acts subsequent to the collection of that harvested material, whether the storage or marketing of that material, compatible with Article 13(3) of Regulation (EC) No 2100/94?”

### Proposed answer:

“Article 13(2) of Regulation (EC) No 2100/94 must be interpreted in the sense that, unless the variety constituents of the protected variety were disposed of by the right holder or with his consent within the meaning of Article 16 of Regulation (EC) No 2100/94, both the preceding act of producing harvested material, within the meaning of Article 13(2)(a) of that Regulation, and the subsequent acts of commercialization of that material provided in Article 13(2)(c)-(g) of that Regulation, are covered by that *ius prohibendi*.”

## C. QUESTION 3

33. Question 3, in its original (English translated) version, was formulated as follows:

“In applying the scheme for extending the cumulative protection to ‘harvested material’, provided for in Article 13(3) of Regulation (EC) No 2100/94, in order for the first condition to be satisfied, is it necessary for the purchase of the plants to have taken place after the holder obtained Community protection for the plant variety, or [Or.10] is it sufficient that at that time the plant variety enjoyed provisional protection, as the purchase took place in the period between publication of the application and the grant of the plant variety right coming into effect?”

Proposed answer:

“Article 13(3) of Regulation (EC) No 2100/94, read in conjunction with Article 95 of that Regulation, must be interpreted in the sense that, for the harvested material to have been obtained through the unauthorized use of variety constituents of the protected variety within the meaning of Article 13(3), it is not necessary that the said variety constituents were purchased after the grant of the EU plant variety right for that variety. It is sufficient that the purchase took place in the period between publication of the application and the grant of the plant variety right coming into effect.”

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